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O.S.A (CAD) No.146 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **10.06.2024**

CORAM

THE HONOURABLE MR.JUSTICE **M.SUNDAR**

and

THE HONOURABLE MRS.JUSTICE **K.GOVINDARAJAN THILAKAVADI**

O.S.A (CAD) No.146 of 2021

&

C.M.P.Nos.20504 and 20517 of 2021 in O.S.A (CAD) No.146 of 2021

Chennai Container Terminal (P) Ltd.,
Represented by its Managing Director /CEO
Administrative Building
Chennai Port Trust
No.1, Rajaji Salai
Chennai – 600 001

... Appellant

Vs.

The Chennai Port Trust
Represented by its Chief Mechanical Engineer
Chennai Port Trust
No.1, Rajaji Salai
Chennai – 600 001

.. Respondent

Original Side Appeals filed under Section 13 (1-A) of
Commercial Courts Act, 2015 to set aside the order dated 22.10.2021 in
O.P.No.400 of 2020.

For Appellant : Mr.R.Murari
Senior counsel
for Mr.Vinod Kumar

For Respondent : Mr.AR.L.Sundaresan



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Additional Solicitor General
Assisted by
Mr.R.Karthikeyan

JUDGMENT

(Judgment of the Court was delivered by **M.Sundar, J.**)

Captioned 'Original Side Appeal' ['OSA' for the sake of brevity] has been presented in this 'Commercial Appellate Division' ['CAD' for the sake of brevity] on 25.11.2021 assailing an 'order dated 22.10.2021 made in O.P.No.400 of 2020 and A.No.2155 of 2020 thereat by a Hon'ble single Judge of this Court' [hereinafter 'impugned order' for the sake of convenience and clarity].

2. Captioned OSA in this CAD is a statutory appeal under Section 37 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity] and aforementioned O.P.No.400 of 2020 before Hon'ble single Judge is one under Section 34 of A and C Act.

3. An arbitral award dated 06.02.2019 made by a three member 'Arbitral Tribunal' ('AT' for the sake of brevity) [to be noted,



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three former Hon'ble Judges of this Court constituted the AT] was before Section 34 Court vide aforementioned O.P.No.400 of 2020. This '06.02.2019 award' shall be referred to as 'impugned award' for the sake of brevity and convenience. It is necessary to write that the three Hon'ble Arbitrators wrote three separate opinions and therefore, three Hon'ble Arbitrators consolidated their opinions and tersely set out the unanimous / majority verdict on all the 19 issues which the AT dealt with.

4. Verdict qua Issue Nos.1 to 5 is common and it is set out vide three sub-paragraphs (A), (B) and (C). The petition assailing the impugned award was filed by the claimant before AT namely 'Chennai Port Trust' ['CPT' for the sake of brevity] and obviously sole respondent before the AT namely 'Chennai Container Terminal (P) Ltd., ['CCTPL' for the sake of brevity] was the sole respondent before Section 34 Court.

5. After full contest, Section 34 Court in and by the impugned order said that aforementioned Issue Nos.1 to 5 before the AT are reclassified as Issue No.3 before the 34 Court and that Issue No.3 alone is set aside. It was also made clear that parties can go for fresh arbitration only on this Issue No.3. When an award is set aside by a Section 34



Court, the consequence is re-arbitration vide paragraph 52 of **McDermott** case law {**McDermott International Inc. Vs. Burn Standard Co. Ltd. and others** reported in (2006) 11 SCC 181} and this paragraph reads as follows:

'52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.'

6. In the case on hand, Section 34 Court has restricted the re-arbitration to Issue No.3 before it [Issue Nos.1 to 5 before the AT]. In this regard, paragraph 38 of the impugned order becomes relevant and the same reads as follows:

'38. Taking note of the settled position of law as discussed above, this Court is of the view the contract has to be read in entirety one clause cannot be read in isolation.



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Paragraph 2 and Clause (e) of the Article 3.12 and other clauses ought to have been construed in the context of the back ground on which clauses have been included. Therefore, such interpretation should be based on judicial approach should not be in arbitrary manner. The Arbitrator cannot supplant their own reasons ignoring the vital documents and evidence particularly to asses the nature of the expenses incurred which are meant to be paid by the Respondent who are the beneficiary of such service. Hence, this Court is of the view that the Award certainly suffers on the ground of patent illegality. Therefore, Award relating to the e interpretation of contract alone can be interfered as the same is severable.

*(underlining made by this
Court for ease of reference)*

7. Assailing the impugned order of Section 34 Court, CCTPL has preferred the captioned intra-court appeal under Section 37 of A and C Act in this CAD.

8. Mr.R.Murari, learned Senior counsel instructed by Mr.Vinod Kumar of M/s.J.Sagar Associates (Law Firm) for the appellant and learned Additional Solicitor General of India Mr.AR.L.Sundaresan instructed by Mr.R.Karthikeyan, learned Standing counsel for CPT were before us.



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9. Adverting to aforementioned impugned order, learned Senior counsel for appellant CCTPL and learned Solicitor very fairly agreed that the impugned order tantamounts to modification of the impugned award as it has interfered with only part of the impugned award and therefore, the same is contrary to the **Hakeem** principle, namely ratio laid down by Hon'ble Supreme Court in **Project Director NHAI Vs. M.Hakeem** reported in **(2021) 9 SCC 1** wherein it was laid down that modification of an arbitral award is impermissible in a Section 34 legal drill.

10. A three member Bench of the Hon'ble Supreme Court doubting the correctness of **Hakeem**, formulated five questions and directed the same to be placed before the Hon'ble Chief Justice of India for an appropriate order. This is vide proceedings / orders dated 20.02.2024 in Special Leave to Appeal (c) Nos.15336-15337/2021 and the order reads as follows:



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ITEM NO.15

COURT NO.4

SECTION XII

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petitions for Special Leave to Appeal (C) Nos.15336-15337/2021

(Arising out of impugned final judgment and order dated 08-08-2019 in OSA No. 50/2015 08-08-2019 in OSA No. 181/2015 passed by the High Court of Judicature at Madras)

GAYATRI BALASANY

Petitioner(s)

VERSUS

M/S ISG KOVASOFT TECHNOLOGIES LIMITED

Respondent(s)

(FOR ADMISSION, FOR REPORTING COMPLIANCE AND I.A. No.42914/2024 for direction)

Date : 20-02-2024 These petitions were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE DIPANKAR DATTA
HON'BLE MR. JUSTICE K.V. VISWANATHAN
HON'BLE MR. JUSTICE SANDEEP MEHTA

For Petitioner(s) Mr. Arvind Datar, Sr. Adv.
Mr. M.V. Mukunda, Adv.
Ms. Hina Shaheen, Adv.
Mr. Mithun Shashank, Adv.
Mr. M.V. Swaroop, Adv.
Mr. Hredai Sriram, Adv.
Mr. Nishanth Patil, AOR

Mr. K. Parameshwar, AOR

For Respondent(s) Mr. Siddharth Bhatnagar, Sr. Adv.
Mr. Debnalya Banerjee, Adv.
Ms. Manmeet Kaur, Adv.
Mr. Rohan Sharma, Adv.
Mr. Gurtej Pal Singh, Adv.
Mr. Abhishek Rana, Adv.
Ms. Ananya Khanna, Adv.
Mr. Aditya Sidhra, Adv.
M/S. Karanjawala & Co., AOR

UPON hearing the counsel the Court made the following
O R D E R



I.A. No.42914/2024 for direction stands dismissed. Time to comply with the order dated 19.10.2023 is extended by three weeks from date.



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SLP(C) Nos.15336-15337/2021

2. Whether or not the Courts in exercise of power under sections 34 or 37 of the Arbitration and Conciliation Act, 1996 are empowered to modify an arbitral award is a question which frequently arises in proceedings not only before this Court but also before the High Courts and the District Courts. While one line of decisions of this Court has answered the aforesaid question in the negative, there are decisions which have either modified the awards of the arbitral tribunals or upheld orders under challenge modifying the awards. It is, therefore, of seminal importance that through an authoritative pronouncement clarity is provided for the guidance of the Courts which are required to exercise jurisdiction under the aforesaid sections 34 and 37, as the case may be, day in and day out.

3. We are of the considered view that the following questions need to be referred to a larger Bench for answers:

1. Whether the powers of the Court under section 34 and 37 of the Arbitration and Conciliation Act, 1996, will include the power to modify an arbitral award?
2. If the power to modify the award is available, whether such power can be exercised only where the award is severable and a part thereof can be modified?
3. Whether the power to set aside an award under section 34 of the Act, being a larger power, will include the power to modify an arbitral award and if so, to what extent?
4. Whether the power to modify an award can be read into the power to set aside an award under section 34 of the Act?
5. Whether the judgment of this Court in **Project Director NHAI vs. M. Hakeem¹**, followed in **Larsen Air Conditioning and Refrigeration Company vs. Union of India²** and **SV Samudram vs. State of Karnataka³** lay down the correct law, as other benches



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of two Judges in **Vedanta Limited vs. Shenzhen Shandong Nuclear Power Construction Company Limited¹, Oriental Structural Engineers Pvt. Ltd. vs. State of Kerala² and M.P. Power Generation Co. Ltd. vs. Ansaldo Energia Spa³** and three Judges in **J.C. Budhraj vs. Chairman, Orissa Mining Corporation Ltd.⁴, Tata Hydroelectric Power Supply Co. Ltd. vs. Union of India⁵ and Shakti Nath vs. Alpha Tiger Cyprus Investment No.3 Ltd.⁶** of this Court have either modified or accepted modification of the arbitral awards under consideration?"

4. The special leave petitions may be placed before the Hon'ble the Chief Justice of India for an appropriate order.

(RAJINI MUKHI)
COURT MASTER (SH)

(PREETHI T.C.)
COURT MASTER (NSH)

11. We are informed by both sides that the reference is before a Constitution Bench and therefore, a Constitution Bench of Hon'ble Supreme Court is in seizin of the question, more particularly the five questions qua **Hakeem**, which are subject matter of reference.

12. When a matter is under reference and in seizin qua a Larger Bench, the original order will continue to hold the field until the reference is answered one way or the other. In this view of the matter, both sides fairly agreed that the matter is to be remitted back to Section 34 Court albeit leaving all questions open including resorting to sub-section (4) of Section 34 of A and C Act. Therefore, on the short point of **Hakeem**



consensus between the two sides, we make the following order:

- i) Impugned order dated 22.10.2021 made in

O.P.No.400 of 2020 and A.No.2155 of 2020 thereat is set aside and the matter is remanded back to the Section 34 Court;

ii) It is made clear that the impugned order is set

iii) All questions before Section 34 Court are left

iv) For adding specificity, we make it clear that it is

v) In the light of sub-section (6) of Section 34, we



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the matter which is remanded back to it as expeditiously as the business of Section 34 Court would permit.

vi) In this regard, we deem it appropriate to refer to paragraph 25 of *State of Bihar Vs. Bihar Rajya Bhumi Vikas Bank Samiti* reported in (2018) 9 SCC 472 and order dated 10.12.2020 in O.P.No.527 of 2020 [*M.Subbiah Vs. Daimler Financial Services India Pvt. Ltd., and another*] made by a Section 34 Court wherein in the light of sub-section (5) being held to be directory, the reckoning date in cases when a Section 34 protagonist approaches the Section 34 Court without issue of sub-section (5) notice would become the date of presentation. In other words, time line qua sub-section (6) of Section 34 is the reminder as regards Section 34 legal drill that is to ensue.

Captioned OSA and captioned CMPs are disposed of with the aforementioned directives. There shall be no order as to costs.

(M.S.J.) (K.G.T.J.)
10.06.2024

Index:Yes/No
Neutral Citation: Yes/No
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and
K.GOVINDARAJAN THILAKAVADI, J.,**

gpa

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